UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NATIONAL NURSES ORGANIZING COMMITTEE/NATIONAL NURSES UNITED (NNOC/NNU), AFL-CIO	)	
Charging Party,	)	**Case No.: 05-CA-182154** **05-CA-187452**
And	)	
HOLY CROSS HEALTH, INC. D/B/A HOLY CROSS HOSPITAL	)	
Respondent.	)	

RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. Introduction

The Counsel for the General Counsel's ("GC") Answering Brief ("GC's Br.") and the Charging Party National Nurses Organizing Committee/National Nurses United's ("Union") Answering Brief ("Union's Br.") to the Hospital's Exceptions ignore credible record evidence and unsuccessfully defend the ALJ's "rush to judgment" decision that resulted in erroneous substantial findings of fact and conclusions of law.

II. The Hospital's Non-Solicitation Policy ("Policy") and Interpretive October 7 Memorandum ("Memo") Are Lawful.

A. The GC And The Union Ignore Substantial Evidence That The Hospital Communicated That Nurses Could Use Email For Discussions About The Union And Nurses Frequently Used Email For That Purpose.

The GC contends that "Despite the prohibition, a few nurses have used the Respondent's email system to discuss the union campaign," GC's Br., 8, fn 9, and that most of the emails contained in Respondent's Exhibit 1 were sent by the Hospital's management. *Id.*; Union's Br., 16. This mischaracterizes the exhibit that the ALJ received into evidence as a *sampling* of the hundreds of emails sent by nurses over the Hospital's email system. Tr. 220:11-17; 224:10-226:9. That email sampling demonstrates that thirteen nurses emailed the list serve that went to all nurses either protesting or supporting the Union. R. Ex. 1. While the GC is correct that Ms. Guarino sent emails to the list serve, nurses also sent or responded to just as many emails if not more. *Id.*

The Union erroneously argues that the sampling of emails "d[id] not account for the other … nurses who remained silent in this matter, many of whom were likely intimidated by the Policy and Memo." Union's Br., 16, 21, fn 10. However, neither the GC nor the Union introduced any evidence of such intimidation. In fact, there is credible evidence that the GC's witnesses used the Hospital's email system. R. Ex. 1 (HCH00528-531); Tr. 103:18-104:9.

The GC's argument that the Hospital did not meet the factors repudiating its allegedly unlawful prohibition on the use of Hospital email under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), GC's Br., 9, fn 10, fails because evidence shows Ms. Guarino communicated to all nurses that the Hospital did not enforce this rule. R. Ex. 1 (HCH000561). The Hospital's repudiation was timely. As the GC has admitted, the repudiation occurred amidst continuous communications to all nurses about the Union between late summer of 2016 through March 17, 2017 on the list serve demonstrating that it was permissible to use email for that purpose. R. Ex. 1. It would be clear error to ignore the uncontroverted evidence that Ms. Guarino clarified that the Hospital permitted such discussion over email when she emailed the list serve on March 17, 2017 stating, "Holy Cross has … made its email system and distribution list available to all nurses so they can exchange ideas and thoughts, whether they or [sic] for or against the union or not." *Id.*

While the GC is correct that some nurses asked to be removed from the list serve, the reason had nothing to do with intimidation. The requests were due to the volume of emails they received from nurses about the Union, *id.* (HCH000552), and the GC ignores the fact that the Hospital did not grant those requests. *Id.* There were over one thousand nurses on the list serve, and there is no proof that anyone stopped reading the emails so it is speculative for the GC to argue that "many of [the] nurses were no longer reading e-mails about the Union" when Ms. Guarino sent the repudiation. *Id*. The GC fabricated this fact. Numerous nurses were responding to emails when Ms. Guarino repudiated the policy, which indicates that nurses read it. R. Ex. 1; Tr. 104:25-105:9. The GC failed to show that any nurse hesitated to use their Hospital email to discuss the Union.

B. <u>Patients Are Frequently Present In Corridors, Stairways and Elevators Used By or To Transport Patients For Treatment-Related Purposes.</u>

The GC's characterization of "patient care" areas is incorrect and its position is not reflected in any evidence in the record. There is substantial record evidence regarding the

frequency with which patients are in the areas of nurses' stations, corridors on the units, stairwells and elevators. Tr. 104:25-20; 180:9-181:15. Moreover, Ms. Ngezem testified that nurses place patients in the corridor at or near the nurses' station where they can closely monitor a confused patient. Tr. 180:9-16. Ms. Mintz testified that patients use or are transported in the elevators throughout the Hospital. Tr. 105:11-13. Finally, there is uncontroverted evidence that outpatients who are coming to or from the Hospital for treatment also may be present in the stairways. Tr. 105:14-20. The GC's witnesses testified to the ubiquitous patient presence in the areas at issue and that patient care takes place in those areas. *Id.* Therefore, patient care considerations warrant restricting solicitation in nurses' stations, corridors on the units, stairwells and elevators when patients are present.

The GC unsuccessfully attempts to establish that cameras were installed around the nurses' station on the mother/baby unit to show that it is not a patient care area. Witness Marianne Wysong's testimony is based on speculation and must be disregarded. Ms. Wysong admitted that she was not present to see any cameras installed and cannot see into the bubble to confirm whether a camera exists. Tr. 345:10-20. There is no evidence that any cameras were installed.

C. <u>The Definition of "Solicitation" Is Unambiguous Because Nurses Understood That They Could Discuss and Solicit For or Against the Union When They Were Not Engaged in Direct Patient Care.</u>

Contrary to the contentions of the GC and the Union, the Board should not apply the rule in *Con-Agra Foods, Inc.*, 361 NLRB No. 113, slip op. at 3 (2014), enf. in part and set aside in part, 813 F.3d 1079 (8th Cir. 2016), because it is not an appropriate basis for a finding of violation in this case where there is evidence of widespread permitted discussion and no evidence that the definition of "solicitation" in the Policy or the Memo chilled discussion or solicitation. The Union's contention on page 15 of its Brief that the Hospital "fails to account for … the *unknown*

number of nurses who could have been chilled in engaging in Section 7 activities because of the Policy and Memo" is ludicrous. It ignores which Party has the burden in this case. The Hospital is not obligated to prove who would not have been chilled.

Moreover, the GC does not even address the Hospital's contention that in this case that, where there has been no restriction of discussion about the Union, the Board should decline to apply *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which renders unlawful almost all employment policies and work rules, and should return to the balancing test it previously applied to restore more certainty to the workplace. *Id.; William Beaumont Hosp*., 363 NLRB No. 162 (2016) (Miscimarra, dissenting). The Union's contention that "Holy Cross cannot claim a legitimate business justification in maintaining its rules" highlights the Union's utter lack of awareness of Hospital operations, the realities of treating patients, or the concerns addressed by the Board in *Beaumont Hospital*. The Hospital exists to serve its sick and rehabilitating patients, and it creates rules to prevent interference with patient care. Specifically, where there has been no restriction of discussion about the Union, the Board should return to Chairman Miscimarra's balancing test that would consider the industry and work setting, provide more certainty for employers, employees and unions, and that would be a better reflection on the policy of the National Labor Relations Act ("Act").

III. There is No Factual Support for the ALJ's Decision that Cynthia Hawley Unlawfully Threatened and Interrogated Susannah Reed-McCullough.

The record does not support the ALJ's finding that Ms. Hawley knew Ms. Reed-McCullough was an open supporter of the Union at the time of their meeting. The GC failed to establish this foundational fact. There is no evidence in the record that Ms. Hawley knew that Ms. Reed-McCullough was a Union supporter in or around July 20. There is no evidence that Ms. Reed-McCullough engaged in such activity in the presence of Ms. Hawley or any other manager.

Tr. 118:4-10. Ms. Reed-McCullough did not testify that Ms. Hawley knew she supported the Union. There is also no record evidence that Ms. Hawley only met with nurses who she knew or believed supported the Union and the GC's contentions on this are incorrect. The ALJ confused witnesses on more than one occasion in his Decision and it is obvious that that the ALJ confused Ms. Reed-McCullough for Ms. Scott who testified that she told Ms. Hawley that she supported the Union around the time of the July 20 meeting. JD 8:5-38; 19:18. In any event, whether confused or not, the ALJ's crucial finding here is not based on ANY record evidence. This is a material error that was the factual basis for the ALJ's conclusion that Ms. Hawley unlawfully threatened Ms. Reed-McCullough. *Id.* The Hospital was not required to call Ms. Hawley as a witness. The GC failed to establish any violation, and specifically failed to establish that Ms. Hawley knew Ms. Reed-McCullough was a Union supporter. Moreover, Ms. Reed-McCullough's testimony taken literally and with all implications establishes that Ms. Hawley did not violate the Act.

The Hospital maintains that the Board does not and cannot require that an employer explicitly reference the collective bargaining process when discussing how terms and conditions of employment may change in order for the statement to be lawful. Most importantly, the GC and Union ignore that Ms. Reed-McCullough testified that "[she] didn't get the sense from [Ms. Hawley] that it was a threat of retaliation." Tr. 129:16-20. The GC and the Union also ignore the fact that Ms. Reed-McCullough testified that Ms. Hawley made several non-coercive statements such as "there wasn't a huge difference being in a unionized hospital versus a non-unionized hospital as far as like staffing and nurse satisfaction goes." Tr. 120:15-19. The GC contends that Ms. Hawley was "aware that Reed-McCullough had certain needs regarding work scheduling and benefits … In an attempt to exploit Reed-McCullough's personal vulnerabilities, Hawley threatened that union representation could affect [her] ability to manage her work/life balance by

adversely impacting her self scheduling …." GC's Br., 19. The GC points out, however, that Ms. Hawley has a right to express her views on how union representation could affect the special scheduling arrangement that Ms. Hawley created for Ms. Reed-McCullough without it being unlawful. Tr. 113:18-24. The GC and the Union' attempt to paint Ms. Hawley as "exploit[ing] Reed-McCullough's personal vulnerabilities," *id.*, is completely opposite to the record evidence. Tr. 115:21-116:25. Ms. Hawley accommodated Ms. Reed-McCullough with those same special arrangements. *Id.*

Finally, the evidence does not support that Ms. Hawley's statement to Ms. Reed-McCullough that, if she ever felt harassed then she should let her know, was unlawful interrogation. The GC once again mischaracterizes the record. Ms. Reed-McCullough did not testify that Ms. Hawley's statement placed "tremendous pressure" on her to reveal fellow nurses' union activities. Tr.115-130.

In fact, Ms. Hawley and Ms. Reed-McCullough had worked together for many years, and there is no evidence that they had anything but a positive working relationship. Tr. 117:13-20. Moreover, the ALJ found that Ms. Hawley encouraged Ms. Reed-McCullough to notify her if union representatives were harassing her; not that she identify who was harassing her. JD 21:45. It defies logic that this statement would be unlawful interrogation that would discourage other nurses from supporting the Union.

IV. The ALJ Erroneously Concluded that Dwight Lyles Coercively Interfered With Nurses' Union Activities.

The GC's reliance on *Clear Lake Hospital*, 223 NLRB 1 (1976) is not appropriate because the facts of that case are not remotely similar to those in the record in this case. In *Clear Lake*, the Board held that the respondent's use of security personnel *to arrest and remove* union organizers in the presence of several employees violated Section 8(a)(1). *Id*. (Emphasis added). Mr. Lyles did

not call the security officers to aggressively arrest or remove the off-duty nurses. Tr. 450:9-25. Mr. Lyles admitted that he did not recognize Ms. Mintz to be a nurse and he did not see her Hospital ID badge, Tr. 452:3-6, 462:18-19, and therefore he did not know whether Ms. Mintz was violating Hospital policies.[1] The security officers did not remove the off-duty nurses or impede with any of their activities, and therefore, it is impossible that Mr. Lyles "us[ed] hospital security to impede employees' lawful organizing activities." GC Br., 32.

V. The ALJ Erroneously Concluded that Security Officers Coercively Interfered With Nurses' Union Activities.

Aqua-Aston Hospitality, 365 NLRB No. 53 (2017), the case relied on by the ALJ, is factually distinguishable on several key points. Unlike in *Aqua-Aston* where the security officers actually stopped off-duty employees from distributing union leaflets, the Hospital's security officers allowed the off-duty nurses to remain in the waiting area and talk to nurses. Tr. 99:12-14. The security officers never prohibited the off-duty nurses from talking to additional nurses and never told them to leave. *Id.* Moreover, the officers never threatened the nurses with trespass or arrest. *Id.* In its brief, the Union misrepresents the facts[2] – the security officers did not approach the off-duty nurses in the waiting area "multiple times, until they left." Union's Br., 30; *see* R. Ex. 32. The video shows that the officers initially approached the off-duty nurses once for a brief period to confirm that they were employees, and then only Officer Webster approached them again to get Ms. Mintz's last name. R. Ex. 32. The security officers' actions are in no way similar to actions which the Board has determined violate the Act as explained in the Hospital's Exceptions

[1] Despite the GC's contention, the video surveillance shows that at 3:24 p.m., Ms. Scott and Ms. Mintz suddenly readjusted their security badges to ensure that they were in compliance with what they understood to be the Hospital's Solicitation Policy. R. Ex. 32. The record also establishes that Ms. Yu was not on break when she left her patients to go into the waiting area to meet with Ms. Scott and Ms. Mintz. Tr. 453:10-20; 456:1-3. It is not appropriate for on duty nurses to leave their patients and go off the unit to have non-work related discussions.

[2] The Union's contention that the Hospital "responded with overwhelming force, sending two security officers – a third of the officers on duty that day," Union's Br., 30, is outrageous. Officer Webster credibly testified that it was common practice to send more than one security officer to respond to calls. Tr. 479:23-480:6.

Brief. The ALJ erroneously used *Aqua-Aston* as a basis for his erroneous conclusion that the security officers prohibited or interfered with union activities.

The Union erroneously points to *Sunrise Healthcare Corp.*, 320 NLRB 510 (1995) as support for its contention that the "Board has also held in other instances with similar facts that health care employers, by their security guards, unlawfully interfered with employees' Section 7 rights." Union's Br., 29. In *Sunrise Healthcare*, a guard stood outside of the employer's entrance in close proximity to a union organizer, shining a flash light in employees' faces who stopped their cars to chat with the organizer and shouted, "Move, you're blocking traffic!" so that employees would drive by the organizer. 320 NLRB 510 (1995). Here, there is no evidence that the security officers verbally or physically stopped the off-duty nurses from engaging in union activities, and the video shows that the nurses stayed in the waiting area for about ten minutes without interference, and no one from the Hospital approached them. Tr. 67:21-68:2; 69:9-10; 269:6-8.

VI. Jolly Joseph and Other NICs Did Not Surveil or Create an Impression of Surveillance In Violation of Section 8(a)(1).

The Board should abandon the rule under *National Steel and Shipbuilding Company*, 324 NLRB 499 (1997) that prohibits all photography except those undertaken for security purposes because such a rigid rule is inconsistent with the policy of the Act. The ALJ's ruling on this claim is a blind application of the rule barring employer photographs of union activity and fails to consider the circumstances of this case. The present circumstances are not that the NICs came prepared with cameras to spy on nurses engaged in union activity. Instead, Ms. Joseph used her cell phone to photograph the nurses, who she thought were celebrating awards, just like she regularly did on the unit when a celebration occurred. Tr. 368:17-24; 372:13-15; 389:14-20. The Board should consider that the pro-union nurses posed for photographs outside of the Hospital in

public view, the pro-union nurses themselves took the photo[3] and published the same photographs to management immediately after the event, the nurses were not intimidated by the sight of the NICs and instead smiled and cheered, and that, after the photographs, the nurses, including Ms. Ngezem who claims that she was intimidated, marched to Hospital administration to present their banner to Dr. Coots thus identifying themselves. The Board should also consider that technology has certainly changed since the Board decided *National Steel and Shipbuilding Company*, and cell phone use for photos is now prevalent. Most adults carry a cell phone at all times and frequently snap photographs on their cell phones in the usual course of their daily activities. Ms. Joseph snapped photos of the nurses like she regularly does when there are celebrations, not to surveil their union activities. Tr. 289:16-20; 371:23-24; 372:13-15; 389:16-20.

The ALJ's ruling is inherently illogical – that the nurses who published photos of themselves engaging in union activity to management (so that management had copies of the photos) were coerced by the mere fact that a manager simultaneously took the same photos. This absurd result can be avoided by conducting a case by case analysis.

VII. <u>There Is No Factual Support For the ALJ's Decision that Mariamma Ninan Unlawfully Threatened Vera Ngezem.</u>

Even if the Board concludes that the employer must reference to the collective bargaining process when talking about potential changes in terms and conditions of employment, Ms. Ninan explicitly referenced the collective bargaining process and thus did not unlawfully threaten Ms. Ngezem. The GC acknowledges that Ms. Ninan testified that "*If there was ever a contract* by the Union, there may be possibility of changing that self-scheduling *to what contract may be negotiated*," and hence referenced the collective bargaining process. Tr. 406:17-21. (Emphasis

[3] The Union claims that a "Union-approved photographer" took the photographs, but there is no evidence in the record supporting this. Union's Br., 34.

added). Ms. Ninan also testified that scheduling flexibility could change if there was a contract – again referencing the collective-bargaining process. Tr. 406:17-407:4; 409:13-17; 431:2-4.[4]

VIII. Officer Hawkins Did Not Interfere With Nurses' Union Activities or Interrogate Nurses In Violation of Section 8(a)(1).

The ALJ improperly relied on *St. John's Health Center*, 37 NLRB 2078 (2011) because the security officers' actions in that case are in no way similar to Officer Hawkins' actions. In *St. John's Health Center*, the security officer threatened to have the employees charged with trespass for distributing union literature. Unlike the GC's and Union's contentions, Officer Hawkins did not threaten to *charge* the nurses for illegal conduct. Tr. 500:9-18. In fact, after learning that the nurses were discussing the Union, Officer Hawkins walked away and left them alone. Tr. 500:17-18. The record is void of any evidence of unlawful interference.[5]

IX. CONCLUSION

For the foregoing reasons, the Board should find merit to the Hospital's exceptions and should reverse the ALJ's findings and conclusions that the Hospital violated the Act.

Dated: September 29, 2017

Respectfully submitted,

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[4] Further, the ALJ found that the Hospital, including Ninan, distributed fact sheets. JD 6:33-35, fn 20, 7:17-18. One of which discusses the collective bargaining process – issued 2 days prior to the meeting between Ngezem and Ninan. R. Ex. 24. There is overwhelming evidence that Ngezem knew working conditions were subject to change because of the collective-bargaining process.

[5] Under the *Bourne* factors analyzed by the ALJ, the Board should reverse the conclusion that Officer Hawkins interrogated the nurses. Officer Hawkins approached the nurses in a main throughway in the Hospital – the corridor outside of the Hospital cafeteria, only steps away from the main lobby. Tr. 288:19-289:4. Both nurses testified that they continuously solicited, discussed the Union, and engaged in other union activities throughout the campaign, even after this incident. Tr. 96:6-10; 100:3-6; 296:24-299:21; 305:20-23; 316:14-317:6. Finally, the ALJ's finding that management instructed Hawkins to allow discussion in that area rebuts the contention that Hawkins acted under the Hospital's direction when he approached and asked the nurses if they were having a union meeting.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served electronically on this 29th day of September, 2017 as follows:

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